

SENATE BILL REPORT

SB 5605

As of February 16, 2011

Title: An act relating to the exercise of reasonable care by state employees and its agents at the department of social and health services and the department of corrections.

Brief Description: Limiting liability for specified state workers for errors of judgment.

Sponsors: Senator Hargrove.

Brief History:

Committee Activity: Human Services & Corrections: 2/10/11.

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Staff: Jennifer Strus (786-7316)

Background: Under RCW 4.92.090, the state of Washington is liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. The state acts through its officers, elected officials, employees, and volunteers. In negligence cases against the state, certain legal principles remain that shield the state from liability. These principles include discretionary immunity, qualified immunity, and the public duty doctrine. The law also recognizes certain exceptions to these legal principles, which have been the legal basis for jury verdicts and settlements against the state.

The Department of Corrections (DOC) and the Department of Social and Health Services (DSHS) operate programs which require employees to choose a course of action under conditions where the outcome from either choice could have a negative impact. These agencies operate supervision programs for criminal offenders released from incarceration or detention; DSHS investigates child and adult cases of abuse and neglect. Agency employees must rely upon their training, education, and experience to make decisions often based upon circumstantial evidence. Sometimes the decision the employee makes results in a bad outcome, despite the employee exercising reasonable care in making the decision.

The law in this state recognizes this professional judgment dilemma in a common law doctrine expressed in the Washington Pattern Jury Instructions as an error in judgment. The pattern instructions permit a court to instruct a jury in a medical malpractice case that the physician is not liable for an error in judgment if, in arriving at that judgment, the physician

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exercised reasonable care and skill within the standard of care the physician was obliged to follow.

In the past several years, the state has been found liable or has agreed to settle cases related to programs at DOC and DSHS. The verdicts and settlements in these cases range in the millions of dollars.

Summary of Bill: DSHS and DOC through their employees and agents are not liable when the state worker or agent exercises reasonable care and selects one of two or more alternative courses of action, even though the course of action chosen results in a poor outcome, if the state worker or agent exercised reasonable care and skill in arriving at the decision to follow the particular course of action.

The intent sections are codified to clarify that the Legislature does not intend to immunize the state against negligence.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Between 2006-2010, the state paid out \$32 million in 27 claims; this is money that could be spent in protecting vulnerable people in our communities. Community correctional officers are forced to make decisions about rehabilitation services vs. protecting the public. They have to make the decision knowing there is liability if they make a decision that does not turn out the way they had hoped. It interferes with recidivism effort and that is where the real cost savings come – lowering the recidivism rate. Should strike the language that a course of action results in poor outcomes because outcomes should not enter into this.

CON: This bill takes a discretionary decision down to the ministerial level. The effect of this bill is that in cases where there is a failure to supervise, there would be an affirmative defense about decisions. There would then be an advantage to finding an excuse about why the decision was made. The affirmative defense will become a jury instruction and will confuse the jury. Takes away the focus of whether DOC or DSHS did their jobs and followed the law. It will cause delay in completing cases. Both DSHS and DOC staff need clarity in what their jobs are. This bill fosters ambiguity. In medical cases where this error in judgment idea comes from, People with legitimate claims being denied any damages.

OTHER: The fiscal note is indeterminate because the AGO said the bill would not result in shifting any responsibility – it would not change things from the way they are now.

Persons Testifying: PRO: Tom Johnson, Washington Federation of State Employees (WFSE); Michael Wiseman, WFSE.

CON: Larry Shannon, Washington State Association for Justice; Jack Connelly, WSAJ.

OTHER: Anna Aylward, DOC.